

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARCHELLE CROWE
Claimant

VS.

LLOYD'S LOADS & COLLECTIONS
Respondent

AND

CONTINENTAL NATIONAL INDEMNITY CO.
Insurance Carrier

Docket No. 1,047,359

ORDER

Claimant requests review of the November 23, 2009 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment finding that "the record did not show by a preponderance of credible evidence that the claimant injured his shoulder and/or neck in the course and scope of employment."¹

The claimant requests review of the Order alleging the ALJ erred in his conclusion as to claimant's injury. Specifically, claimant maintains the evidence sufficiently establishes that he did meet with personal injury by accident arising out of and in the course of his employment. Thus, claimant asks the Board to reverse the ALJ's Order and grant him medical treatment.

Respondent argues that the ALJ's Order should be affirmed.

¹ ALJ Order (Nov. 23, 2009) at 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order contains a very thorough recitation of the details surrounding this claim and this member adopts that statement as her own. Succinctly put, claimant alleges he injured his neck and/or shoulder while repetitively throwing heavy buckets and using a trac-hoe in the course of his employment. Claimant says he told his supervisor of his injury on August 22, 2008 and on that date the two of them contacted the human resources department, spoke with Jane and not only completed and filed a written claim with respondent on that date (via fax), but claimant was also authorized to see his own physician for treatment.

There are, however, a number of difficulties with that version of the events, all of which were noted by the ALJ. First, respondent's representative, Gregory Smith, testified that the woman referred to as "Jane" did not work for respondent in August 2008. Indeed, she did not begin working for respondent until October 2008. Thus, she could not have been the person to send (via fax) the claim form to claimant or receive the form back, nor could she have authorized medical treatment with claimant's own physician. Second, no record of a claim form was ever found. There is evidence of another accident that occurred, but nothing in connection with a claim asserted on August 22, 2008. And while Jane was later terminated for failing to follow procedures, her shortcomings in her job are irrelevant if she wasn't even working at the time claimant says he spoke to her and notified the company's human resources department about his injury.

Third, claimant proceeded to seek treatment from his own physician ostensibly with authority from Jane. Yet, there is no indication within the physician's records that his complaints of neck and shoulder pain were as a result of a work-related injury. The records do show that claimant had similar complaints to the same area of the body in 2005 and on August 22, 2008 there is some reference to claimant using a "trac-hoe". There is nothing within these records that suggests claimant's employer should be billed or that he has been authorized by his employer to obtain treatment from this provider.

Fourth, claimant continued to work and apparently his symptoms improved as he sought no treatment from September 25, 2008 to April 13, 2009, which was nearly 2 months after claimant last worked for respondent.²

Fifth, claimant sought an evaluation from Dr. Prostic and included within his report is a history of the injury. This report indicates that claimant denied any prior problems with his neck and shoulder before *this* injury. The report also indicates that claimant suffered

² Claimant last worked for respondent on February 14, 2009.

from a series of injuries up until his last day of work, February 14, 2009, as he was using the “trac-hoe”. Dr. Prostic describes a series of ongoing complaints up to the last day of work. But the other medical records seem to indicate a period of treatment from August 22, 2008 to September 25, 2008, followed by a 5 month gap in treatment.

Finally, the ALJ saw each of the three witnesses testify in this matter and he was obviously more persuaded by the credibility of Mr. Smith over that of claimant and his co-worker and former supervisor.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁵

Here, the ALJ was simply not persuaded by claimant’s evidence. He concluded there were too many inconsistencies and a lack of credibility to justify a finding that claimant’s injury arose out of and in the course of his employment.

This Board Member finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant, his witness and respondent’s representative testify in person. In denying claimant’s request for medical treatment the ALJ apparently believed their testimony over the claimant’s testimony. This Board Member concludes that some deference may be given to the ALJ’s findings and conclusions because he was able to judge the witnesses’ credibility by personally observing them testify.

After considering the entirety of the record, this Board Member finds the ALJ’s Order should be affirmed.

³ K.S.A. 2008 Supp. 44-501(a).

⁴ K.S.A. 2008 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁶ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated November 23, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁶ K.S.A. 44-534a.